



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Corporate Strategies, Inc.

File: B-239219

Date: August 3, 1990

Robert H. Leilich, for the protester.
Joseph Kerner, Federal Railroad Administration, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq.,
Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency improperly made award on the basis of initial proposals without discussions, where the record does not clearly show that the agency's decision to restrict the competitive range to one firm was reasonable, since offers rated "excellent" or "good" were lower priced and record shows discussions could have resolved weaknesses in proposal.

DECISION

Corporate Strategies, Inc. (CSI) protests the Federal Railroad Administration's (FRA) award of a contract to Transmode Consultants, Inc. under request for proposals (RFP) No. DTFR53-89-R-00004 for a study of grain shipment contracts. CSI contends that the award was improper because it was made on the basis of initial offers, without holding discussions.

We sustain the protest.

The RFP requested proposals to study the impact of rail deregulation and recent changes in contract disclosure rules on railroads, shippers and on the level of traffic under shipping contracts for grain and other agricultural products. The agency reports that since government deregulation of the railroad industry, the government has provided for increased disclosure of contract terms in shipping contracts for agricultural products. Subsequent to these increased disclosure requirements, there has been a dramatic decrease in the number of new grain contracts,

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although non-grain transportation contracts have tended generally to increase during this period. The proposed study is to examine whether the increased disclosure of contract terms was responsible for the drop in grain transportation contracts, and whether the efficiency of rail grain operations has been adversely affected.

The solicitation was initially issued as RFP No. DTFR53-89-R-00028 in August 1989. CSI submitted the only proposal, which was evaluated as technically unacceptable. The RFP was therefore canceled. CSI received a debriefing, and when the FRA reissued the solicitation in November as the RFP at issue here, CSI rewrote its proposal. Nine firms responded to this solicitation, including CSI and Transmode. The award criteria established under the RFP informed offerors that award would be made to that responsible offeror whose proposal was most advantageous to the government, cost and other factors considered. Paramount consideration was to be given to technical quality rather than cost. As proposals became more equal in their technical merit, the evaluated cost or price would become more important.

The Technical Evaluation Team (TET) reviewed the proposals and found Transmode's technical proposal to be superior to the others. It was ranked first, with a score of 883.5 points (on a scale of 1,000 points), which placed it within the range of "excellent." Two other proposals received scores within this rating category. CSI received the fourth highest score, with 776 points, which placed it in the "good" range.

The agency then reviewed the cost proposals to determine whether award could be made on the basis of initial proposals. It was found that except for one lower-ranking proposal, all of the offers were lower than the government estimate. The second-rated technical proposal was higher in cost than Transmode's. The proposal that was rated excellent and ranked third technically was 15 percent lower in price than Transmode's offer. CSI's offer, which had been ranked in fourth place for technical merit, was 18 percent lower in price than Transmode's offer. The source selection official (SSO) agreed that the lower-ranked proposals contained technical weaknesses that could not be corrected without technical transfusion occurring, and that technical quality should therefore be the dominant deciding factor in the award decision. The SSO concluded that only Transmode's offer was within the competitive range. The agency awarded the contract to Transmode without conducting discussions with any offeror.

When CSI received notice of the award, it requested and received a debriefing. It then filed its protest with our Office. Since the protest had not been filed within 10 calendar days of the date of the award, the agency was not required to, and did not, stay the performance of the contract under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (1988).

CSI protests that it was improper for the agency to "unilaterally" reject its proposal (and award the contract to Transmode) without holding discussions.^{1/}

Under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(b)(d)(1)(B) (1988), agencies may make awards on the basis of initial proposals without discussions only when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the government. The statute prohibits acceptance of an initial proposal where there is at least one other lower cost, technically acceptable proposal in the competitive range. United Telecontrol Elec., Inc., B-230246, B-230246.2, June 21, 1988, 88-1 CPD ¶ 590.

The agency justifies its award to Transmode by characterizing all other proposals as being outside of the competitive range. Determinations by contracting agencies that leave only one proposal within the competitive range are closely scrutinized by our Office. Besserman Corp., B-237327, Feb. 14, 1990, 90-1 CPD ¶ 191. If there is a close question of acceptability; if there is an opportunity for significant cost savings; if the inadequacies of the solicitation contributed to the technical deficiency of the proposal; or if the informational deficiency could be reasonably corrected by relatively limited discussions, then inclusion of the proposal in the competitive range and discussions are in order. Id.

^{1/} FRA argues that CSI's protest filed on April 6, 1990, is untimely since it was filed more than 10 working days after CSI's receipt of notice of award on March 22, 1990. 4 C.F.R. § 21.2(a) (1990). However, the record shows that upon receipt of this notice CSI requested a debriefing and a copy of the awardee's proposal under the Freedom of Information Act by letter of March 22. A debriefing was held on April 2, 1990, and the protest is based on information from that debriefing. Accordingly, CSI's April 6 protest was timely filed.

Here, we think the agency's determination to restrict the competitive range to Transmode alone was unreasonable. The evaluation documents that have been provided for our in camera review do not support such a narrowly drawn competitive range. The second-highest technical score was only 26 points lower than Transmode's, on a scale of 1,000 points; the next highest score was 52 points lower than Transmode's, and CSI's score was 107 points lower. The second and third highest scores were within the "excellent" range. Moreover, the evaluators' narratives do not identify any deficiencies in these proposals.

Rather, the award to Transmode without discussions is supported in the record primarily by general statements about the uniqueness and innovativeness of Transmode's proposal, and the agency's conclusion that discussions with the other offerors would not be likely to result in significant improvement to their proposals sufficient to make them equivalent to the Transmode proposal. This conclusion is in turn supported by the agency's belief that technical weakness in the lower-ranked offers could not be revealed to the offerors without technical transgression occurring.

We find inadequate support in the record for these conclusions. The agency's repeated assertion that Transmode's approach is unique and superior--so much so, that discussions with any other offeror would be futile--is supported only by conclusory statements. The TET's report states, for example, that Transmode's approach:

"will encompass a larger array of possible strategies and events underlying those strategies to accurately determine the net impact the new disclosure rules have had and are having on rail transportation contracts at issue. Furthermore, this approach breaks new ground by placing the evolution of rail transportation contracts in an innovative conceptual framework that goes beyond the requirements of the RFP."

Following this, the report concludes that "proposals submitted by [the other offerors in the excellent or good categories] did not go as far as Transmode's in the presentation of other factors that can affect contracting." It is not clear to us why this sort of weakness--lack of discussion concerning other factors that can affect contracting--could not be disclosed to these offerors without revealing Transmode's approach. Furthermore, we are not persuaded that the strengths cited in the Transmode

evaluation reasonably merit the exclusion of all other offerors. The agency's position appears to be that Transmode's proposal was considered so superior that even if discussions were held, Transmode would have received the award even though a significantly lower-priced, excellent rated proposal was submitted. We think that CICA provides that a technical/cost trade-off of this type can only be made after discussions and receipt of best and final offers (BAFOs). See Pan Am Support Serv., Inc.--Request for Recon., 66 Comp. Gen. 457 (1987), 87-1 CPD ¶ 512.

Regarding CSI's proposal, the agency states that it was ranked in the category of "good" rather than "excellent" as a result of concerns the agency had about CSI's proposed means for gathering information. The FRA felt that permission to gain access to confidential information in the manner proposed presented a risk that could potentially cause the collapse of the study. However, after reviewing the awardee's proposal in camera, it appears to us that Transmode's proposed method of gathering data could entail similar risks. In addition, we find nothing in the record to explain why the question of this risk could not have been clarified during discussions. Further, CSI's proposal was also considered weak because it purportedly emphasized rail cost issues and did not adequately discuss other market factors besides regulation which would contribute to changes in the number of contracts or the volumes under contract. With regard to cost issues, CSI's proposal explicitly stated that the study was not to be considered a rail cost study. It also listed relevant other factors, but did not discuss them in any detail. If, as the evaluators concluded, CSI emphasized the cost issues and did not provide sufficient discussion of the other factors, we think both matters reasonably could have been the subject of discussions.

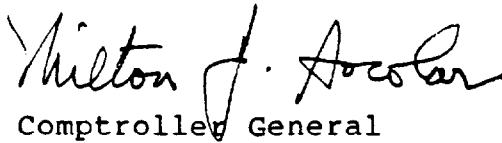
Given the close scrutiny applicable to determinations that result in a competitive range of one, we do not think that the FRA could reasonably exclude CSI and other higher rated offerors for weaknesses which these offerors did not have a fair opportunity to address. Since discussions reasonably could have improved these offerors' proposals, which were already rated high, and at least two offers were significantly lower in cost, a technical/cost trade-off may have resulted in a different award decision. Accordingly, we sustain the protest.

The appropriate remedy where an agency improperly awards a contract on the basis of initial proposals would ordinarily be for the agency to reopen the competition, hold discussions with all offerors properly within the competitive range and request BAFOs. However, because

Transmode is already performing the contract (which is of relatively short duration) it is impracticable to terminate Transmode's contract at this time.

Under the circumstances, we find that the protester is entitled to recover its costs of proposal preparation and the costs of filing and pursuing the protest, including reasonable attorneys' fees, because CSI was unreasonably excluded from the competition. 4 C.F.R. § 21.6(d) (1990); Data Preparation, Inc., B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300. CSI should submit its claim for such costs directly to the agency.

The protest is sustained.2/



Acting Comptroller General
of the United States

2/ CSI also contends that information contained in CSI's proposal may have been disclosed to Transmode by a subcontractor. CSI states that it had revealed its technical proposal to its subcontractor, ALK & Associates, under the prior solicitation for this study which the agency canceled, and that some of ALK's principals later joined Transmode. While CSI contends that some confidential information may have been revealed by ALK, there is no evidence in the record that this was the result of any government misconduct.